SUPREME COURT, U. S.

DEC 1 1 1973

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1233

NATIONAL LABOR RELATIONS BOARD AND PETER G. NASH, GENERAL COUNSEL,

Petitioners,

vs.

SEARS, ROEBUCK AND CO.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AS AMICUS CURIAE, IN SUPPORT OF RESPONDENT

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INTEREST OF THE AMICUS CURIAE[1]

The Chamber is a federation consisting of a membership of over 3,700 state and local chambers of commerce and trade and professional associations, a direct business membership in excess of 38,000 and an underlying membership of approximately 5,000,000 business firms and individuals. It is the largest association of business and professional organizations in the United States.

1. Consent of Respondent and Petitioner's statement that he will not *interpose* any objection to the Chamber's participation have been filed with this Court.

The Chamber regularly represents the interests of its member-employers in important labor relations matters vitally affecting those interests. Such representation constitutes a significant aspect of the Chamber's functions. Accordingly, the Chamber has sought to advance those interests in a wide spectrum of labor relations litigation before this Court.[2]

The question presented in the instant case, whether parties before the General Counsel of the National Labor Relations Board are entitled to disclosure of decisions which contain orders and directions controlling the disposition of their cases before the General Counsel and the Board, is an issue of particular concern to the Chamber's members who have an unsatisfied need to know the information contained in the General Counsel's Advice and Appeals decisions, since such decisions would otherwise comprise an undisclosed body of law which controls and governs their labor relations practices and policies.

Moreover, the decision of the court below, requiring the General Counsel to disclose the heretofore secret Advice and Appeals decisions, comports with the letter of as well as the sound policy underlying the Freedom of Information Act[3] and benefits not only employers, but all others—labor organizations as well as individuals—who are affected by the General Counsel's orders and directions. Because of its broad representation of a large class of those so affected and the importance to them of this issue, the Chamber believes it appropriate to present its views to this Court, in support of the decisions below.

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2. *E.g., Connell Construction Company, Inc.* v. *Plumbers and Steamfitters Local Union No. 100, etc.*, No. 73-1256; *Marco DeFunis, et al.* v. *Charles Odegaard, et al.*, No. 73-235; *Super Tire Engineering Company* v. *McCorkle, et al.*, No. 72-1554; *Corning Glass Works* v. *Brennan*, No. 73-29; *N.L.R.B.* v. *Bell Aerospace Company Division of Textron, Inc.*, No. 72-1598; *N.L.R.B.* v. *The Boeing Company, et al.*, 93 S.Ct. 1952; *N.L.R.B.* v. *Granite State Joint Board*, 409 U.S. 213 (1972); *N.L.R.B.* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 517 (1971); *Boys Markets* v. *Retail Clerks Union*, 398 U.S. 235 (1970).

3. 5 U.S.C. Sec. 552, *et seq.* (hereinafter also called the FOIA or the Act).

SUMMARY OF THE ARGUMENT

I.

Congress' purpose in enacting the Freedom of Information Act, 5 U.S.C. Sec. 552, *et seq.* was to prevent prejudice to citizens resulting from the intransigence of federal agencies in refusing to make available a body of undisclosed secret agency law governing the rights and interests of private parties involved in proceedings before those agencies. Accordingly, the Act requires agencies to disclose and make available "final opinions . . . as well as orders made in the adjudication of cases" and "instructions to staff that affect a member of the public." (5 U.S.C. Sec. 552(a)(2)(A); (a)(2)(C).)

The General Counsel of the National Labor Relations Board is conceded to be an agency within the meaning of the Act. Further, under the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151, *et seq.*, the General Counsel has the authority to finally determine whether to issue complaints based upon the unfair labor practice charges of private parties, whether to dismiss those charges, and whether to accept a pre-complaint settlement even over the objections of the charging party. Further, he has authority to frame the issues to be litigated and to decide the legal theory to be employed. The General Counsel's decisional authority in these respects is not directly reviewable under the NLRA.

Many of the General Counsel's final decisions or binding staff instructions are contained in documents known as "Advice" and "Appeal" decisions which dispose of unfair labor practice charges. These documents contain the effective law of the General Counsel and control his disposition of the case under consideration or even subsequent cases raising the same or similar issues. Thus, they are the type of final orders and instructions to staff which the Act requires to be disclosed. The General Counsel's refusal to make these documents available to

private parties so that they might know the law which controls the disposition of their cases and thus be able to fully and effectively present their theories and arguments, results in the kind of prejudice against which the Act is aimed.

II.

The exemptions contained in the FOIA are not applicable to Advice and Appeals decisions. Exemption 5 was designed to assure that memoranda reflecting individuals' deliberations or factional debates be kept confidential. However, Advice and Appeals decisions do not contain these debates or deliberations; consequently, such decisions cannot claim insulation from disclosure under exemption 5.

Exemption 7 is also inapplicable. This exemption was designed to maintain the confidentiality of investigative techniques, sources of information and statements of witnesses since their publication may retard the agency's ability to enforce the law. Advice and Appeals decisions reveal neither informants nor investigative techniques and their disclosure will in no way impede the General Counsel's ability to enforce the law. On the contrary, disclosure of these decisions containing as they do the Agency's operating law will advance the Agency's goal by encouraging knowledgable and voluntary compliance with the law.

Exemption 2 like exemptions 5 and 7 cannot immunize the requested decisions from disclosure. The second exemption was intended to insulate from publication only internal personnel rules and practices devoid of any impact upon the public. Since Advice and Appeals decisions do not contain internal personnel rules and practices, as those terms are construed by the Senate and lower courts, exemption 2 does not serve as a reliable defense to prevent disclosure.

III.

The court below after finding that the FOIA dictates disclosure of Advice and Appeals decisions required, in addition, that materials incorporated by reference in these decisions also be disclosed and that the term "circumstances of the case" sometimes found in these decisions be expanded to detail the circumstances relied upon. The court's rulings are correct; otherwise, the General Counsel by shorthand drafting could render the disclosed decisions incomprehensible and useless and the mandates of the FOIA nugatory. Furthermore, the courts guarded against any inappropriate disclosure by permitting names of witnesses that may be included in the decisions at issue to be deleted. In addition, the courts below properly ordered prompt disclosure and indexing.

ARGUMENT

I. Disclosure of the Advice and Appeals Decisions Is Mandated by Congressional Will and the Needs of the Parties

The FOIA represents Congress' broad attempt to permit access to information heretofore unnecessarily concealed from public view and reflects Congressional concern that the public must have a judicially enforceable right to obtain this information from recalcitrant government officials. The Act was a reaction to the history surrounding Section 3 of the Administrative Procedure Act, 5 U.S.C. Section 1002 which, contrary to the intent of its sponsors, came to be regarded as a statute endorsing governmental secrecy rather than disclosure. Unlike the APA, the FOIA eliminates the "properly and directly concerned" test for access to information and instead provides that official information shall be disclosed "to the public", "for public inspection". Furthermore, the agency attempting to withhold information bears the burden in an expeditious district court hearing to establish that the requested material is expressly exempt from disclosure.[4] It is now beyond

4. *Environmental Protection Agency* v. *Mink*, 410 U.S. 73 (1973); S. Rep. No. 813, 89th Cong., 1st Sess. 3, 9, 10 (1965).

dispute that the FOIA must be construed to make available the maximum information reasonably considered to be embraced within the ambit of that Act.[5]

When the Act's policy of maximum disclosure is coupled, as in the instant case, with the genuine need of parties before the General Counsel for administrative decisions which exert impact upon those dealing with the Agency, a compelling argument for publication is presented.

It is the parties involved in agency proceedings who, even more than the general public, receive the benefits of disclosure bestowed by the Act. These parties will be most often victims of an agency's mistakes and irregularities. Unless information contained in these decisions impacting upon the public and parties before the Agency is made available to these parties, agency irregularities will go unnoticed and unremedied.[6]

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5. *Sterling Drug, Inc.* v. *F.T.C.*, 450 F. 2d 698 (CA DC, 1971); *Hawkes* v. *I.R.S.*, 467 F. 2d 787 (CA 6, 1972); Davis, *The Information Act: A Preliminary Analysis*, 34 U. Chi. L. Rev. 761 (1961).

6. The Senate manifested a direct concern for *parties* involved in controversies with an agency:

> "requiring the agencies to keep a current index of their orders, opinions, etc. is necessary to afford the private citizen the essential information to enable him to deal effectively and knowledgeably with the Federal agencies. This change *will prevent a citizen from losing a controversy with an agency* because of some obscure and hidden order or opinion which the agency knows about but has been unavailable to the citizen simply because he had no way in which to discover it . . ." (S.R. No. 813 at 7.)

The House, too, displayed its concern for the rights of plaintiffs who, when involved in agency proceedings, seek information from the agency:

> "Information sought by *plaintiffs* from Government is likely to be a perishable commodity and . . . delays . . . may result in substantive damage to *plaintiff's case*. In some circumstances, such foot-dragging in the courts can render the information totally useless, if and when it is ever made available by the Federal bureaucracy." (Emphasis added) (H.R. No. 92-1419, 92nd Cong., 2nd Sess. 2 (1972).)

Thus, Congress quite clearly foresaw and intended that the FOIA would be applied in pending matters.

In the instant case, the importance to litigants before the General Counsel of that Agency's decisions whose disclosure is at issue derives from the functions of that Agency.[7] The General Counsel of the National Labor Relations Board is congressionally charged in general with the duties to investigate allegations that the Labor Act has been violated, to determine if these charges have merit, and if so, to issue a formal complaint or to seek to remedy these violations by informal voluntary settlement. If the General Counsel decides that the charges lack merit, he is to dismiss them without hearing. The scheme of the Labor Act dictates that the Labor Board's role is restricted to reviewing only those decisions which are made following formal complaint and administrative hearing or following settlements approved by that Agency in lieu of proceeding through a hearing. Thus, the Board acts only with respect to the issues framed by the General Counsel in his pleadings and the arguments advanced by him during the hearing.[8]

Moreover, the judgment of the General Counsel in deciding whether specific conduct violates the law, in framing the issues to be litigated and in determining the appropriate relief, is final and unreviewable.[9] The unreviewable and final determinations of the General Counsel are frequently contained in the decisions whose disclosure is at issue in this case: Advice and Appeals decisions.

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7. It is conceded by the Petitioner that the General Counsel constitutes an Agency.

8. This discussion omits reference to representation matters arising under Section 9 of the Labor Act, which are not perinent here, and is restricted to unfair labor practice cases arising under Sections 8 and 10.

9. *Hourihan* v. *N.L.R.B.*, 201 F. 2d 187 (CA DC, 1953), *cert. den.* 345 U.S. 930; *Vaca* v. *Sipes*, 386 U.S. 171, 182 (1967); *Terminal Freight Cooperative Assn., et al.* v. *N.L.R.B.*, 447 F. 2d 1099 (CA 3, 1971), *reh. den.* 461 F. 2d 777, *cert. den.* 81 LRRM 2894. Under Section 3(d) of the Act, the General Counsel is conferred with ". . . *final authority* on behalf of the Board, in respect to the investigation of charges and issuance of complaints under Section 10, and in respect to the prosecution of such complaints before the Board, . . .". (emphasis supplied)

The Advice decisions represent a *"final determination . . ."* of the General Counsel, recite "facts upon which the Advice Branch relied in making its determination, the exact issue involved, instructions for the processing of the case, and detailed legal rationale including any pertinent Board or Court decisions."[10] (emphasis supplied)

It is thus apparent from the General Counsel's own acknowledgment that these decisions are binding instructions to his staff and contain that Agency's construction of substantive law, applied to the facts of the case under consideration. In these decisions the General Counsel frames the issues, directs that a complaint issue or declines to do so, and details his understanding of the applicable law. Where the decision dictates dismissal of the case, that decision is a final binding instruction to his staff unless appealed. When Advice instructs the Regional Office to issue complaint, it is the Advice Branch that has framed the issues and supplied the legal theories and construction of the law. This determination to issue complaint and litigate *only* pursuant to the theories developed by the General Counsel is final. It appears that where Advice decides to proceed to complaint and enunciates the legal theory to be employed, the charging party may appeal only to the Advice Branch of the *General Counsel* if this decision for any reason fails to consider fully the charging party's interests.[11]

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10. Statement of the General Counsel submitted to the House Labor Subcommittee on the N.L.R.B. on June 29, 1961, reported at Para. 1150.01, CCH Labor Law Reports, 3076.

11. Thus, in his report on operations in 1961, the General Counsel stated following a discussion on the finality of Advice's determinations:

> "Because of the complexity or novelty of the cases submitted for advice, parties occasionally . . . seek personal conferences with the General Counsel or the Assistant General Counsel. Since it is of the utmost importance to understand fully the issues, as well as the positions of the parties in these cases, such meetings are ordinarily arranged. However, in order to avoid any semblance of ex parte proceedings, all other parties in the case are invariably and immediately notified of such meetings

Consequently, whether or not complaint is directed, the Advice decisions constitute final opinions and binding instructions to the staff that affect a member of the public—the party involved in the agency's proceeding.

Indeed, contrary to the General Counsel's assertion, Regional Directors are required to submit novel or important issues to Advice and are obligated to follow the determination of the Advice Branch. The record below does not disclose even a single instance where a determination by Advice was not followed. The General Counsel is, of course, bound by the record below. Since he has not demonstrated that Regional offices can resolve cases in a manner contrary to the determination of Advice or Appeals, his suggestions to this Court that Regional offices may act contrary to Advice or Appeals must be rejected by this Court. Thus, the Regional offices have absolutely no discretion to act contrary to Advice's final and binding conclusion. Further, Regional offices must issue complaints or dismiss charges in a manner wholly consonant with Advice and Appeals decisions in similar cases. (See Respondent's Brief, page 17.)

Appeals decisions, like those of Advice, constitute a final disposition of an appeal, and contain an analysis of the General Counsel's view of the substantive or procedural law and policy.[12] No further appeal lies from any decision that may be rendered by the General Counsel's Office of Appeals.

It is apparent that the nature of the requested decisions are such that non-disclosure will substantially injure parties involved in Agency proceedings. Thus, Advice and Appeals

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and are given an equal opportunity to meet with the General Counsel or the Assistant General Counsel and fully state their position." (see footnote 10)

See also, 1971 Report Labor Relations Law Section American Bar Association p. 243 (Vol. II) where the Bar concluded that parties have an opportunity to orally argue before the Advice Branch.

12. Statement of the General Counsel submitted to the House Labor Subcommittee on the N.L.R.B. on June 29, 1961, reported at Para. 1150.01, CCH Labor Law Reports, 3082.

decisions are needed: *first,* to enable a charging or charged party to protect his interests and, for example, to knowledgably evaluate terms of any proposed settlement; *second,* to adequately present an appeal to the General Counsel (such is the use of these decisions in the administrative decision underlying the instant case); *third,* to determine if the decision of the General Counsel constitutes an abuse of discretion; *fourth,* to evaluate whether the General Counsel's decision to issue complaint contains the legal theory most appropriate the interests of the public and charging party; *fifth,* to enable the charged party to know the legal theory he must combat (since there are no provisions for discovery under the Labor Act, this seems to be a reasonably claimed right). In addition and to elborate, the interests of a party who files a charge alleging a violation of the Labor Act will be critically and adversely affected if Advice and Appeals decisions in related cases are not promptly disclosed at the time the charge is filed. That is, a charging party must have access to Advice and Appeals decisions previously issued in related cases so that *during* the investigation of his charge, he may rely upon these guides and present arguments and evidence necessary to protect his interests before the General Counsel has reached a decision on the merits of his charge. Denial of access to these decisions at an early stage during the investigation will result in the charging party being unprepared and unable to argue the differences between his case and those that may be relied upon by the General Counsel. Without access to these decisions, the charging party will be unable to advance alternative theories or to show the General Counsel departed from precedent whether by accident or due to a change in Agency policy. Fundamentally, without Advice and Appeals decisions in related cases, the charging party is unaware of the nature of the evidence he need introduce in order to support the General Counsel (and a charged party does not know what evidence he must counter.) So also, without these decisions a charging party whose charge is dismissed

by the General Counsel is unable to effectively frame his appeal because he does not know the theory, arguments or case law relied upon by the General Counsel and therefore cannot be certain that he is addressing himself directly to the General Counsel's position.[13]

Further, absent access to these Agency decisions, the charging party will not be able to determine whether the General Counsel abused his discretion or disobeyed a statutory direction and thus assert the only basis he has to protest the General Counsel's refusal to issue a complaint. The FOIA thus enables a party to have access to decisions that allow a party to determine if discretion is abused.[14]

Finally, non-disclosure of these decisions will frequently prejudice a charging party should the matter go to formal hearing. Thus, the General Counsel's agents charged with prosecutorial duties are obliged to follow the decision of the General Counsel who frames the triable issues. These agents may misinterpret or misuse documentary evidence or may not recognize the full potential of available probative material or the most advantageous theory to the charging party and public. Absent disclosure of the General Counsel's theory and construction of

13. Moreover, non-disclosure of the Appeals decisions will prevent the aggrieved party from refuting or distinguishing the theories and law relied upon by the *Office of Appeals* when it closed the case, and from effectively urging his position on a request for reconsideration. In the 1961 Statement, *supra*, the General Counsel stated that while an initial decision of the Office of Appeals ordinarily closes the matter, requests for reconsideration "are entertained". In such instances, the evidence in its entirety is carefully reviewed in the light of reasons advanced by the changing party in support of his request and all interested parties are notified of the disposition of the matter. (Statement of the General Counsel submitted to the House Labor Subcommittee on the NLRB on June 29, 1961, reported at Para. 1150.01, CCH Labor Law Reports, 3082.) However, the charging party's reasons may well miss the mark if he does not know the *theories* and arguments with which he must contend, and he may consequently lose his controversy with the General Counsel. That is what Congress sought to avoid by the commands of the FOIA.

14. *Leedom* v. *Kyne*, 358 U.S. 184 (1958).

the law both in the proceeding then being litigated and in past related cases, the primary party to the proceeding—the charging party—will lose his opportunity to maximize his litigation posture or protect his rights from deliberate or unintentional adverse acts of the prosecutor. Thus, the charging party needs Advice and Appeals decisions in order to exercise its right to convince the General Counsel to proceed on a theory more acceptable to the charging party's interests. Further, the charging party must have the opportunity afforded by disclosure of Advice decisions to determine if the field staff is following the General Counsel's directions.

A party charged with an unfair labor practice is equally at the mercy of the General Counsel's thoroughness and fairness. Unless he has access to decisions relating to issues in his case at a very early stage of the investigation and before the General Counsel has crystalized his views, he will have no real opportunity to effectively confront, distinguish or refute the General Counsel's theories, arguments and precedents that are contained in these decisions and that will be relied upon by that Agency or the Regional offices.

It is evident that the General Counsel's theories and interpretations of the labor law are contained in Advice and Appeals decisions and exert a substantial impact on the rights of litigants before that Agency. The record is devoid of any evidence that these decisions contain any reference to trial tactics or settlement directions. Consequently, disclosure will in no way impede the General Counsel's functions. Moreover, these decisions need not have precedential value for the *Labor Board* for disclosure to be mandated by the FOIA. [15] The fact that these decisions are relied upon by the *General Counsel* in issuing binding staff instructions compels disclosure to the public.

Therefore, the Agency's failure of disclosure herein violates the congressional objective to promote disclosure and to curtail

15. The Labor Board is a separate agency, not to be confused with the General Counsel.

unnecessary administrative secrecy, achieves a real but pointless injury to the private interests of the litigants and causes the public to lose the important protection to its collective interest of knowing what law governs their interests—and why.[16]

16. Indeed, since 1970 the Labor Law Section of the American Bar Association, consisting of leading members of the labor bar representing both unions and management, determined:

> "[T]hese 'precedents' [Advice and Appeals decisions] constitute precisely the kinds of 'final opinions, statements of policy and interpretations' and 'instructions to staff that affect a member of the public,' which the Freedom of Information Act contemplates should be indexed and made available to the public."

Vol. II 1970 Report, Labor Relations Law Section, American Bar Association, p. 7. The Labor Law Section has consistently adhered to this position to the present time and with regard to the instant case, has urged the General Counsel to comply fully with the decisions of the lower courts. Vol. II, 1972 Report, pp. 219:

> "The Committee also inquired with respect to requests by charging parties for advice memoranda in connection with a case that was then being submitted to the Office of Appeals. The Committee urged that such memoranda be supplied to the charging and charged parties because dismissal letters, as a rule, do not apprise the parties of the issues and rationale which led to the dismissal of the charge. . . . it still believes that there is no substitute for the basic memorandum which, in most cases, constitutes the only insight into the law and policy governing the case."

See also. Vol. II, 1973 Report, p. 244. In the 1974 Committee Reports, pp. 249-250 the Committee said:

> ". . . your Committee continues to adhere to the view that where documents are expressly incorporated by reference in memoranda, they should be produced (see 1973 Committee Report, p. 4A). Moreover, where memoranda rely upon 'circumstances of the case' or some other vague, imprecise, or undelineated reference, explanatory materials should also be made available. Finally, we believe that the General Counsel should not delete material without fully explaining or justifying the basis for such deletion." (p. 250)

The lower court's orders are consonant with the view of the Labor Law Section and they do not delve into the decisional processes—the agenda system of confrontation and discussion—but only direct the production of ". . . the end product . . ." (H. Rep. No. 1497, 89th Cong., 2nd Sess., p. 7 (1966)) of that agenda process—the General Counsel's resultant final law.

On a quarterly basis the General Counsel does publish a summary of a few cases which he deems to be of unusual interest. Of the

II. The Act's Standards for Disclosure Are Satisfied.

The resolution of the issues of disclosure in this cause turns upon whether the Advice and Appeals decisions are final orders or binding staff instructions affecting the public as the Chamber and Respondent contend, or whether they are exempted intra-agency communications, parts of investigatory files or internal personnel rules or practices, as the General Counsel claims.[17]

A. *Exemption 5: Intra-Agency Memoranda*

Two reliable guides have been developed to aid in determining whether the decisions requested here are required to be disclosed or instead fall within the ambit of exemption 5. First, decisions reflecting agency policy and its view of the law are disclosable. Such documents are the agency's end product and represent its opinions or interpretations of law and policy.[18] On the other hand, documents containing factional debates or individuals' deliberations as the agency strives to formulate its policy or interpretation of the law may be kept confidential. These criteria reflect the design of the fifth exemption which dictates that officials should be judged by their decisions rather

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hundreds of other cases coming within his jurisdiction nothing is published. See, *e.g., Columbus Building & Construction Trade Council, AFL-CIO, et al. (The Chamber of Commerce of the United States of America)* Cases Nos. 9-CC-706-2 thru -20. (A. 1) There is no justification to refuse to disclose other Advice and Appeals decisions simply because the Agency does not deem them to possess unusual interest.

17. Under the design of the FOIA, an agency must bear a weighty burden when it seeks to delimit disclosure of requested readily identifiable documents. *Bristol-Myers* v. *F.T.C.*, 424 F.2d 925 (CA DC, 1970).

18. *Sterling Drug, Inc.* v. *F.T.C., supra,* where the court stated: "[P]rivate transmittals of binding agency opinions and interpretations should not be encouraged. These are not the ideas and theories which go into the making of the law, they are the law itself, and as such should be made available to the public. Thus, to prevent the development of secret law within the Commission, we must require it to disclose orders and interpretations which it actually applies in cases before it." *Id.* at 708.

than by the matters they examined before reaching their conclusions.[19]

Viewed against these tests, it is apparent that Advice and Appeals decisions are disclosable. Advice and Appeals decisions, as stated, *supra*, constitute the General Counsel's final opinions, construction of substantive and procedural law and/or mandatory staff instructions.[20]

Furthermore, as demonstrated by the Respondent, neither Advice nor Appeals decisions contain the internal debates or disputes of staff members that precede the determination of the General Counsel's policy and the formulation of his view of the law. Therefore, production of these documents will not in any manner stifle the deliberative process, and there is no need to immunize them from disclosure by exemption 5.

In sum, the requested decisions not only enunciate Agency policy and its construction of the law, (rather than individuals' debates or opinions) but in addition dictate final and ultimate Agency action. Exemption 5 is thus clearly inapplicable.[21]

B. *Exemption 7: Investigatory Files*

Notwithstanding that the crux of Advice and Appeals decisions represents the General Counsel's position on substantive law, that Agency now asserts that this operating law can be

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19. Congressional Commentaries demonstrate that Exemption 5 was designed to encourage frank deliberation before the agency's policy was formulated. S. Rep. 813, 89th Cong., 1st Sess. 3 (1965). The courts and commentators have found similar objectives. *Grumman Aircraft Engineering Corp.* v. *Renegotiation Board*, 482 F. 2d 710, 718 (CA DC, 1973) cert. granted No. 73-1316; argument set in tandem with the instant case. *Soucie* v. *David*, 448 F. 2d 1067 (CA DC, 1971). Davis, *The Information Act: A Preliminary Analysis*, 34 U. Chi. L. Rev. 761, 797 (1961).

20. *Hawkes* v. *I.R.S.*, *supra*. Professor Davis has stated that the Act "calls for disclosure of all 'opinions and interpretations' which embody the agency's effective law and policy . . .". Davis, *The Information Act: A Preliminary Analysis*, *supra* at 797.

21. *Administrative law—1973*, 1974 Duke L. J. 251, 271.

withheld from the public as a part of Agency investigatory files. However, this contention must fail inasmuch as exemption 7 was not designed to insulate from disclosure an agency's effective law and policy.

Rather, exemption 7 was intended for the limited purpose of maintaining the confidentiality of investgiative techniques, sources of information and statements of witnesses.[22] These matters may be kept confidential when their revelation would impede or defeat law enforcement. Accordingly, interrogation techniques, mechanics of an FBI stake-out and selective enforcement policies necessary due to a lack of personnel may be immune from disclosure, since publication would retard the law enforcement responsibility of the agency.[23] On the other hand, documents that reflect the agency's "end product" and reveal the agency's position on substantive or procedural law, such as Advice and Appeals decisions, must be disclosed under the terms of the FOIA. Advice and Appeals decisions represent the Agency's "basis for administrative action" rather than traditional confidential instructions, and accordingly are subject to "public examination" even though the General Counsel may perform investigative and prosecutorial functions. S. Rep. No. 813, 89th Cong., 1st Sess. (1965), p. 2. Such decisions, when made public, would aid law enforcement, rather than frustrate it, by encouraging knowledgable compliance with the Agency's law.[24] In short, since it is conceded that the requested decisions reveal neither informants nor investigative techniques, exemption 7 does not foreclose their publication.[25]

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22. *Aspen* v. *Department of Defense*, 491 F. 2d 24 (CA DC, 1973); *Evans* v. *Department of Transportation*, 446 F. 2d 821 (CA 5, 1971) *cert. denied* 405 U.S. 918 (1972).

23. *Hawkes* v. *I.R.S., supra; Stokes* v. *Brennan*, 476 F. 2d 699 (CA 5, 1973).

24. *Stokes* v. *Brennan, supra; Administrative Law—1973*, 1974 Duke L. J. at 282. There, at note 169, Professor Davis reasons that I.R.S. guidelines for staff in auditing of tax returns should be disclosed to the extent they reveal the position of the I.R.S. on questions of tax law.

25. See Respondent's Brief page 15. The General Counsel has failed in his burden to show below that the requested decisions con-

Exemption 2: Internal personnel rules and practices

Exemption 2, like exemptions 5 and 7, may not insulate the requested decisions from public disclosure. Exemption 2 was designed to protect from disclosure only documents pertaining to employer-employee concerns which have no impact upon the public.[26] Furthermore, a review of precedents yields the conclusion that lower courts have consistently applied a narrow construction to this exemption. Thus, the words "internal" and "personnel" have been found to modify both "rules" and "practices".[27]

This judicial construction of exemption 2 is consonant with the Senate's understanding of that exemption's scope. That is, commenting on this exemption, the Senate said that internal personnel rules and practices includes parking regulations, lunch schedules and sick leave policies.[28] Thus, the courts and the Senate have limited the reach of exemption 2 to matters wholly devoid of impact upon the public.

While the House commentaries purport to include staff manuals within the ambit of this exemption, this interpretation has

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tain informants or investigative techniques. Consequently, any assertion that investigative matters or techniques will be revealed if disclosure is ordered should be rejected by this Court. Moreover, the placement of these decisions in Regional office files cannot forestall publication of the Agency's operating law. The policies of the FOIA may not be flouted by this device.

26. *Hawkes* v. *I.R.S.*, *supra*. According to that court, examples of materials exempt from disclosure under the second exemption include the amount of time an employee is to devote to his work and instructions concerning an employee's use of his employer's equipment.

27. *Consumers Union of United States, Inc.* v. *V.A.*, 301 F. Supp. 976, 800 (S.D.N.Y.), appeal dismissed because moot 436 F.2d 1363 (CA 2, 1971); *Benson* v. *G.S.A.*, 289 F.Supp. 590, 594 (W.D. Wash., 1968), aff'd on other grounds, 415 F.2d 878 (CA 9, 1969). In addition, note: *The Freedom of Information Act: A Seven Year Assessment*, 74 Col. L. Rev. 895, 957 (1974), hereinafter, FOIA Assessment.

28. S. Rep. No. 813, *supra* at 8.

been criticized by Professor Davis[29] and in addition conflicts with other portions of the FOIA which in general require disclosure of instructions to staff.[30]

It is apparent that if exemption 2 is to fit within the overall design of the FOIA, it must have been intended to have only the narrow reach attributed to it by the Senate and the lower courts. The House view conflicts with portions of the FOIA and is antithetical to the Act's disclosure mandates.[31]

Viewing the content of the requested decisions against the background of Senate commentaries on and judicial construction of exemption 2, it is apparent that these decisions do not contain "internal personnel rules and practices" and are not insulated by that exemption from disclosure.

III. The District Court Properly Required That Complete Advice and Appeals Decisions Be Produced.

As Respondent stated (Brief 26-28) the drafters of Advice and Appeals decisions often employ shorthand terms such as the "circumstances of the case", or refer to documents which are incorporated by reference.

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29. Davis, *Administrative Law Treatise* (1970 Supp.) Section 3 A.9, 3 A.31.

30. Pursuant to subdivision (a)(2)(c), staff manuals or memoranda containing the agency's interpretation of substantive or procedural law are subject to disclosure. Indeed, courts have immunized these documents from disclosure only where publications may retard the agency's goals by enabling "law violators to escape detection." *Hawkes* v. *I.R.S., supra* at 795. Thus, as stated *supra*, staff instructions concerning investigative methods may be kept confidential. However, instructional manuals or memoranda containing the agency's view of the law must be disclosed since voluntary and knowledgeable compliance with the law will thereby be encouraged and the agency's goals advanced. *Hawkes* v. *I.R.S., supra* at 795. *Stokes* v. *Brennan, supra,* at 702. Note: *FOIA Assessment, supra* at 904.

31. The House report was drafted only under heavy agency pressure after the FOIA had passed the Senate on the basis of a committee report that was faithful to the words of the bill. Davis, *Administrative Law Treatise* (1970 Supp.) Section 3 A.31.

It is apparent that documents incorporated by reference in Advice or Appeals decisions must be disclosed and that conversely, the Agency may not, be efficient drafting, insulate these incorporated documents from disclosure. A decision in an Advice or Appeals document that turns upon the construction of a contract clause, for example, is meaningless unless the contract term as well as the decisional document is disclosed. Furthermore, the technique of relying upon the "circumstances of the case" without publishing those circumstances renders the decision meaningless and the mandates of the FOIA nugatory.[32]

Accordingly, when the General Counsel resorts to shorthand terms or incorporates material by reference in decisional or instructive documents, he must not only publish these decisions, as discussed above, but also disclose the "circumstances" relied upon and the incorporated material as well.[33]

IV. Disclosure Must Be Prompt with Decisions Properly Indexed.

It is apparent that the mandate to disclose will be nugatory unless it is accompanied with an order requiring that the disclosure be promptly accomplished and that the decisions be indexed in a useful fashion. A subject matter index would be most useful and effectuate the policies of the Act. In the most recently adopted amendments to the FOIA, Congress required both expeditious disclosure and indexing. (5 U.S.C. Section 552(a)(a), 552(a)(4)(d), 552(a)(6).) Thus, Congress dem-

32. See the 1974 Report, Labor Relations Law Section, American Bar Association, 250, footnote 16, *supra*.

33. There is no need to produce investigatory files to comply with the disclosure requirement urged in the text above. Indeed, the District Court below did not order the production of these files. That court instead permitted the General Counsel to select the method to be used to supply facts missing from Advice and Appeals decisions where the presentation of these facts was necessary for a complete understanding of these documents. The district court below also permitted a deletion of affiant's names from decisional documents and did not require the production of witnesses' affidavits or other matter "exempt under the Act."

onstrated a continuing preoccupation with the public's right of access to hitherto confidential information.[34]

CONCLUSION

For the reasons set forth above, and those in Respondent's brief, it is respectfully requested that the judgments of the courts below be affirmed.

Respectfully submitted,

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34. In addition, in *Automobile Club of Missouri* v. *National Labor Relations Board, et al., Appellants, Chamber of Commerce of the United States, Intervenor,* ..... F. 2d ..... (1973) 84 LRRM 2423 (1973), where indexing of representation cases was ordered by the lower court, the Petitioner did not appeal this order to this Court.

The 1970 Report, Labor Relations Law Section, American Bar Association, Vol. II, p. 9, states:

> "However, your Committee believes the Board's obligations under the Freedom of Information Act cannot be indefinitely delayed and that, in accordance with Congressional will expressed in the Act, the Board should immediately undertake the preparation of an index and other suitable procedures for public access to the *Advice and Appeals Memoranda.*"

APPENDIX

NATIONAL LABOR RELATIONS BOARD
Office of The General Counsel
Washington, D.C. 20570

PICKETING TO OBTAIN 8(e) PROVISO AGREEMENTS IN CONSTRUCTION INDUSTRY

A number of cases have raised the issue of whether a construction union violates sections 8(b)(4)(A) and/or 8(e) when it seeks or obtains by picketing an otherwise valid on-site construction subcontracting clause under the 8(e) proviso from a contractor who does not himself employ employees of the craft represented by that union.

The contentions of the Charging Parties as well as a number of arguments developed by the General Counsel's office itself, have been considered in detail as has been the recent decision of the Fifth Circuit Court of Appeals in the *Connell* case.[1] The General Counsel has concluded, for the reasons discussed fully below, that there is not sufficient basis to authorize complaint in these cases.

While not directly attacking the Board's holding in *Centlivre*,[2] it has been contended that an agreement entered into by or sought between the contractor and the union is not within the privilege of the construction industry proviso to Section 8(e), and that the union's conduct to obtain the agreement accordingly violated the Act, because the contractor did not employ employees

1. *Connell Construction Company* v. *Plumbers & Steamfitters Local No. 100*, 5th Circuit, 72-1243, August 23, 1973.

2. *Northeastern Indiana Building and Construction Trades Council, et al. (Centlivre Village Apartments)*, 148 NLRB 854, enforcement denied on other grounds, 352 F.2d 606 (C.A. D.C.).

of the craft represented by the union and had no collective-bargaining relationship with the union.[2a]

As the initial point of departure, the Board's decision in *Centlivre, supra,* which has been uniformly followed since its decision ten years ago, is now settled law for the General Counsel. The Board there accepted the view of all those Circuit Courts of Appeal which had passed on the issue[3] and had uniformly rejected the Board's prior view.[4] The Board in *Centlivre* held, as had the Courts, that a union's strike to *obtain* an agreement which would be privileged under the construction industry proviso did not violate Section 8(b)(4)(A).[5]

2a. Alternatively, it is argued that, although the agreement may be privileged under the 8(e) construction proviso, the absence of a collective-bargaining relationship between the contractor from whom the agreement is sought and the union seeking the agreement, renders economic action by the union violative of Section 8(b)(4)(A). However, the Board has made it clear that picketing to obtain such a clause is not violative of Section 8(b)(4)(A), if the clause is within the construction proviso. (See e.g. fn. 19, *supra.*) Thus the basic issue remains whether the sought-after clause comes within the proviso.

3. *Construction, Production & Maintenance Laborers Union, Local 383, et al.* v. *N.L.R.B. (Colson and Stevens Construction Co.),* 323 F.2d 422 (C.A. 9); *Essex County and Vicinity District Council of Carpenters and Millwrights, United Brotherhood of Carpenters, etc. (Associated Contractors of Essex County, Inc.)* v. *N.L.R.B.,* 332 F.2d 636 (C.A. 3); *Orange Belt District Council of Painters No. 48, AFL-CIO, et al. (Calhoun Drywall Co.)* v. *N.L.R.B.,* 328 F.2d 534 (C.A. D.C.). See also *Local Union No. 48 of Sheet Metal Workers* v. *Hardy Corp.,* 332 F.2d 682 (C.A. 5).

4. The Board's prior view set out in *Colson and Stevens,* 137 NLRB 1650, was that only voluntary agreements were within the construction industry proviso to Section 8(e).

5. Section 8(b)(4)(A) of the Act, as amended by the Landrum-Griffin Act of 1959, makes it an unfair labor practice for a union to induce employees to strike or to threaten, coerce or restrain any person where an object is:

> (A) forcing or requiring any employer . . . to enter into any agreement which is prohibited by Section 8(e).

Section 8(b)(4)(B) could nevertheless, as in *Centlivre* itself, be violated if the union's conduct sought the breaking of an existing business relationship at the site of construction, i.e., had an immediate cease doing business object.

The Board there stated:

> Subsequent to the issuance of *Colson and Stevens*, however, United States Courts of Appeals for three separate circuits have considered and uniformly rejected the above analysis and conclusion. In essence these cases hold that the Board failed to give sufficient scope to the construction industry proviso to 8(e).

In view of the Centlivre holding, the Section 8(b)(4)(A) and Section 8(e) issues of the instant cases turn on whether the agreement entered into or sought between the contractor and the union would violate Section 8(e) for the reasons urged by the Charging Parties.

Section 8(e) provides in pertinent part:

> "It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided*, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting or repair of a building, structure, or other work. . . ."

Since the Union here is a "labor organization" and the contractor "an employer in the construction industry," and since their agreement is confined to the work to be done at the site of construction, the agreement clearly comes within the language of the proviso to Section 8(e). Left then are the contentions of the Charging Parties that there are two alternative implicit preconditions to the validity of an agreement otherwise within the construction industry exemption: (1) that there be

an existing collective-bargaining relationship between the parties to the agreement; or (2) that the employer party employ employees doing the kind of work covered or to be covered by the agreement. These contentions are now considered.

While recognizing that a proviso to a general statutory prohibition is to be narrowly construed, the contentions of the Charging Parties cannot be considered on mere axioms of interpretation since the purpose and scope of the construction industry proviso has been the subject of substantial Board and Court litigation in the almost 15 years since its enactment.

The issues here raised involve, of course, a "*secondary*" agreement to be applied to work at a site of construction and not a primary agreement.[6]

> "However, provisos were added to § 8(e) to preserve the *status quo* in the construction industry, and exempt the garment industry from the prohibitions of §§ 8(e) and 8(b)(4)(B). This action of the Congress is a strong confirmation that Congress meant that both §§ 8(e) and 8(b)(4)(B) reach only secondary pressures. If the body of § 8(e) applies only to secondary activity, the garment industry proviso is a justifiable exception which allows what the legislative history shows it was designed to allow,

6. The distinction from cases involving "primary" objects such as union recognition sought through direct (picketing) pressure on an employer is set out in the Court's decision in *Dallas Building Trades Council* v. *N.L.R.B.*, 396 F.2d 677, 682 (C.A. D.C.):

> The Board's responses to these arguments are, however, convincing. First, there is no inconsistency between the Board's interpretation of Section 8(b)(7) and the purposes of Section 8(e). It simply does not follow from the fact that the agreement would be lawful if voluntarily adopted that a labor organization can employ illegal means to obtain it. *Sections 8(b)(7) and 8(e) are aimed at wholly different problems.* And the proscriptions of Section 8(b)(7) do not vary with the legality of the agreement sought. Picketing to obtain a wage agreement, for example, is no more lawful than picketing to obtain a hot cargo clause. (Emphasis supplied.)

See also *Building and Construction Trades Council of Philadelphia and Vicinity (Samuel E. Long, Inc.)*, 201 NLRB No. 42, 1973, enfd. 485 F.2d 680 (C.A. 3, 1973).

secondary pressures to counteract the effects of sweatshop conditions in an industry with a highly integrated process of production between jobbers, manufacturers, contractors and subcontractors. First, this motivation for the proviso sheds light on the central theme of the body of § 8(e), from which the proviso is an exception. Second, if the body of that provision and § 8(b)(4)(B) were construed to prohibit primary agreements and their maintenance, such as those concerning work preservation, the proviso would have the highly unlikely effect, unjustified in any of the statute's history, of permitting garment workers, but garment workers only, to preserve their jobs against subcontracting or prefabrication by such agreements and by strikes and boycotts to enforce them. Similarly, the construction industry proviso, which permits 'hot cargo' agreements only for jobsite work, would have the curious and unsupported result of allowing the construction worker to make agreements preserving his traditional tasks against jobsite prefabrication and subcontracting, but not against nonjobsite prefabrication and subcontracting. On the other hand, if the heart of § 8(e) is construed to be directed only to secondary activities, the construction proviso becomes, as it was intended to be, a measure designed to allow agreements pertaining to certain secondary activities on the construction site because of the close community of interests there,[32] but to ban secondary-objective agreements concerning nonjobsite work, in which respect the construction industry is no different from any other. The provisos are therefore substantial probative support that primary work preservation agreements were not to be within the ban of § 8(e)." (At 637-639)

"32. See *Essex County and Vicinity Dist. Council of Carpenters* v. *Labor Board*, 332 F.2d 636 (C.A. 3d Cir. 1964); Comments, The Impact of the Taft-Hartley Act on the Building and Construction Industry, 60 Yale L.J. 673, 684-689 (1951)."

The Court's statement has, of course, pointed significance concerning both the legislative purpose underlying the construc-

tion industry proviso and the contentions of the Charging Parties here. Thus the Court, as noted above, stated that the proviso was:

> ". . . intended to be, a measure designed to allow agreements pertaining to certain secondary activities on the construction site because of the close community of interests there,[32] but to ban any secondary objective agreements concerning non-jobsite work, in which respect the construction industry is no different from any other."

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32. *supra.*

The Court's citation at footnote 32 to the Third Circuit's decision, *Essex County, supra,* amplifies the meaning of "close community of interests" at the construction site,[7] which underlies the exemption.

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7. The Court's citation of the Yale Law Journal Comment is equally significant. That Comment, published shortly before the Supreme Court's decision in *Denver Building,* expressed, at the pages cited, disagreement with the Board's finding of violation in the case because of the relationships at a construction site. On page 689 of the Comment this view is set forth as follows:

> "The general contractor in the construction industry is in a significantly different position. Unlike B, in the example above, the general contractor's own labor policies are the reason his place of work is being picketed. For he has brought onto the job a non-union subcontractor. This, as Judge Clark pointed out in his dissent in the *Electrical Workers* case, is immediate cause of the dispute. For purposes of 8(b)(4)(A) all the men working on the job should be considered the general contractor's employees; he should not be allowed to insulate himself from the effects of having non-union men work side by side with union men simply because the custom and structure of the industry places a subcontractor between him and direct employment of the non-union men. In other words, the test should be whether the direct employer of the non-union men (the subcontractor) is sufficiently closely connected both geographically and economically with the direct employer (the general contractor) so that the labor policies of the one may be attributed to the other. The contractor-subcontractor relationship in the construction industry should be held to satisfy this test.
>
> The general contractor, however, should be regarded as the employer of a subcontractor's employees only for purposes of that job where the two contractors are working together. There-

The Third Circuit had explained it as follows:

> This limited exemption was granted apparently in recognition of problems peculiar to the construction industry, particularly those resulting from sporadic work stoppages occasioned by the traditional refusal of craft unionists to work alongside non-union men on the same project. (At p. 640.)

This view of the proviso's purpose is also set forth in *Drivers Local 695* v. *N.L.R.B.*,[8] where the Circuit Court, in pertinent part, stated:

> "The purpose of the Section 8(e) proviso was to alleviate the friction that may arise when union men work continuously alongside non-union men on the same construction site.[22]

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22. See *Essex County & Vic. District Council of Carpenters, etc.* v. *N.L.R.B.*, 332 F.2d 636, 640 (3rd Cir. 1964); *N.L.R.B.* v. *Denver Bldg. & Const. Trades Council*, 341 U.S. 675, 692, 71 S. Ct. 943, 95 L. Ed. 1284 (1951) (Douglas J. dissenting); Comment, *Hot Cargo Agreements Under the National Labor Relations Act: An Analysis of Section 8(e)*, 38 N.Y.U.L. Rev. 97, 111 (1963); Comment 45 Cornell L.Q. 724, 753 (1960).

And the dissent[9] in *Denver Building*, referred to in *Drivers Local 695*, stated:

> "The employment of union and nonunion men on the same job is a basic protest in trade union history. That was the protest here. The union was not out to destroy the contractor because of his antiunion attitude. The union was not pursuing the contractor to other jobs. All the union asked

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fore, although a construction union trying to organize any subcontractor on a project should have the right to picket the entire project, it should not be permitted to extend its activity to other sites on which the picketing is to organize a particular job, the geographical boundaries of that job should mark the confines of the dispute.

8. 361 F.2d 547, 551 (C.A. D.C., 1966).

9. Justices Douglas and Reed.

was that union men not be compelled to work alongside nonunion men on the same job. As Judge Rifkind stated in an analogous case, 'the union was not extending its activity to a front remote from the immediate dispute but to one intimately and indeed inextricably united to it.'[1]

"The picketing would undoubtedly have been legal if there had been no subcontractor involved—if the general contractor had put nonunion men on the job. The presence of a subcontractor does not alter one whit the realities of the situation; the protest of the union is precisely the same. In each the union was trying to protect the job on which union men were employed. If that is forbidden, the Taft-Hartley Act makes the right to strike, guaranteed by § 13, dependent on fortuitous business arrangements that have no significance so far as the evils of the secondary boycott are concerned. I would give scope to both § 8(b)(4) and § 13 by reading the restrictions of § 8(b)(4) to reach the case where an industrial dispute spreads from the job to another front.[2]

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1. *Douds* v. *Metropolitan Federation*, 75 F. Supp. 672, 677.

2. See the opinion of Judge Fahy below, 87 U.S. App. D.C. 293, 186 F.2d 326; and the dissenting opinion of Judge Clark, *International brotherhood* v. *N.L.R.B.*, 181 F.2d 34, 40.

It seems clear from the foregoing, even before proceeding to consideration of the relevant Board decisions from *Centlivre* to the present, that the construction industry proviso has been recognized as privileging what may be characterized as "Denver Building Agreements" confined to the site of construction. That is, while the Supreme Court decision in *Denver Building* was not overruled,[10] *agreements* covering *Denver Building* relation-

10. That *Denver Building* was not "overruled" by the Supreme Court's decisions in *General Electric*, 366 U.S. 667, and *Carrier*, 376 U.S. 492, is fully set forth in the Board's decision in *Markwell and Hartz*, 155 NLRB 319, enfd. 387 F.2d 79 (C.A. 5); see also 383 F. 2d 562 (C.A. 6). *Markwell and Hartz*, however, gives no support to the contentions of the Charging Party concerning construction industry on-site *agreements*.

ships at a construction site were exempted from the prohibition of Section 8(e).[11]

In sum then, since the construction industry proviso deals with "secondary" agreements, the "community of interest" involved is not tied to concepts of "unit work preservation" but rather to interests of those doing work (or business) at the jobsite. And based on this interest Congress permitted agreements there which, being "secondary" would otherwise and elsewhere be prohibited.

The legislative history supports this view. As pointed out by the Board in *Centlivre* at footnote 17:

> "The intent of Congress to retain the then existing law in connection with secondary boycotts in the construction industry is apparent from the following statement by the House conferees:
>
> > *"The committee of conference does not intend that this proviso should be construed so as to change the present state of the law with respect to the validity of this specific type of agreement relating to work to be done at the site of the construction project,* or to remove the limitations which the present law imposes with respect to such agreements. Picketing to enforce such contracts would be illegal under the *Sand Door* cases *(Local 1976, United Brotherhood of Carpenters (and Joiners of America, AFL, et al. (Sand Door & Plywood Co.))* v. *N.L.R.B.*, 357 U.S. 93 (1958)). *To the extent that such agreements are legal today under Section 8(b)(4) of the National Labor Relations Act, as amended, the proviso would prevent such legality from being affected by Section 8(e). The pro-*

11. *Denver Building* itself points away from the Charging Parties' contentions. Thus it appears that the neutral general contractor there, Doose and Lintner, did not employ electricians but, rather, subcontracted electrical work to the primary nonunion electrical contractor, Gould and Preisner. Indeed the Supreme Court, in rejecting the Union's contention that it had a primary dispute with Doose and Lintner in seeking to force Doose and Lintner to make the project an all-union job, pointed out that "If, for example, Doose and Lintner had been doing all the electrical work on this project through its own nonunion employees, it could have replaced them with union men and thus dispose of the dispute." (At p. 688.)

> *viso applies only to Section 8(e)* and therefore leaves unaffected the law developed under Section 8(b)(4). The *Denver Building Trades* case and the *Moore Drydock* cases would remain in full force and effect. The proviso is not intended to limit, change, or modify the present state of the law with respect to picketing at the site of a construction project. Restrictions and limitations imposed upon such picketing under present law as interpreted, for example, in the U.S. Supreme Court decision in the *Denver Building Trades* case would remain in full force and effect. . . . House Conference Report on Labor-Management Reporting and Disclosure Act of 1959, House Report 1147, 86th Cong., 1st sessions, pp. 39-40." (Emphasis supplied with respect to portions bearing on "agreements.")

This is supported further by the statements of Senators Kennedy and Goldwater in the legislative history. Senator Kennedy explained the 1959 amendments as follows:

> *"The first proviso under new section 8(e) of the National Labor Relations Act is intended to preserve the present state of the law* with respect to picketing at the site of a construction project and *with respect to the validity of agreements relating to the contracting of work to be done at the site of a construction project.*
>
> "*This proviso affects only section 8(e)* and therefore leaves unaffected the law developed under section 8(b)(4). The Denver Building Trades (341 U.S. 675) and the Moore Drydock (92 N.L.R.B. 547) cases would remain in force.
>
> "*Agreements by which a contractor in the construction industry promises not to subcontract work on a construction site to a nonunion contractor appear to be legal today. They will not be unlawful under section 8(e). The proviso is also applicable to all other agreements involving undertakings not to do work on a construction project site with other contractors or subcontractors regardless of the precise relation between them.*[12] Since the proviso does not relate

12. Relied on by the Board in *Carvel*, 152 NLRB 1672, discussed below.

to section 8(b)(4), strikes and picketing to enforce the contracts excepted by the proviso will continue to be illegal under section 8(b)(4) whenever the Sand Door case (357 U.S. 93) is applicable.

"It is not intended to change the law with respect to the judicial enforcement of these contracts, or with respect to the legality of a strike to obtain such a contract.

"It should be particularly noted that *the proviso relates only to 'contracting or subcontracting of work to be done at the site of the construction.'* The proviso does not cover boycotts of goods manufactured in an industrial plant for installation at the jobsite, or suppliers who do not work at the jobsite. [II Leg. Hist. Act of 1959, 1433(3).]" (Emphasis supplied.)

And Senator Goldwater stated:

"*There is a further exemption from the prohibitions against 'hot cargo' agreements only, under section 8(e), with respect to a segmetnt of the building construction industry and the labor unions representing employees in that segment of the industry. This exemption is granted only where the employer with whom such an agreement is signed is in the construction industry and engages only in construction work at the site;* it does not apply where the employer, although in the construction industry, is not engaged in construction work at the site such as enterprises primarily engaged in supplying or transporting building construction materials. *Where an employer falls into this limited category, it is not an unfair labor practice for such employer and a labor union to enter into an agreement* whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of another employer, or to cease doing business with any other person, and *such an agreement is not per se unlawful.* Unlike the exemption for the apparel and clothing industry, the prohibitions of the secondary boycott ban in section 8(b)(4), as amended, are however, applicable to these situations.

"Thus, although *employers and unions who are under this exemption may lawfully enter into such agreements,* and

> may resort to the courts for their enforcement under applicable principles of contract law, no coercion or restraint —economic or otherwise—may be used by any party to such an agreement, even if entered into voluntarily by both parties, to compel the other party to live up to the contract or to refrain from breaching it." [II Leg. Hist. (1959) 1858(1)] (Emphasis supplied.)

Turning now to consideration of relevant Board law from *Centlivre* to the present, the Board decisions provide no support, but rather undercut, the contentions of the Charging Parties.[13] In *Centlivre* itself, the Board, in accepting the view of the Circuit Courts which had "uniformly rejected" the prior Board view, stated: "in essence these [Court] cases hold that the Board failed to give sufficient scope to the construction proviso to Section 8(e)." The Board then treated the clauses there involved as within the construction industry proviso to Section 8(e).[14] And the facts of *Centlivre* run contrary to the contentions of the Charging Party here. The Respondent Unions there included a Construction Trades Council and affiliated locals, including Painters, Laborers, Carpenters, Plumbers, Sheet Metal Workers, Iron Workers, and Electrical Workers. Also Respondent was a Bricklayers Local. The Respondent Unions

13. *Building Material & Construction Teamsters Union Local No. 216 (Bigge Drayage Co.)*, 198 NLRB No. 130, and *General Teamsters Local 386 (Construction Materials Trucking, Inc.)*, 198 NLRB No. 129, cited on appeal for the proposition that such agreements are secondary in nature and therefore illegal, are not in point because they do not relate to on-site work.

14. The Board in footnote 11 of its decision stated:

> "Neither the General Counsel nor the Charging Party disputes the proviso's application to the clauses in question. Accordingly, there being no issue before us as to the validity of such clauses, we assume, for purposes of this case, that they are within the proviso and lawful.

There is no indication, however, that this reservation had any relationship to the factors argues for by the Charging Party in the instant case. (See discussion of *Colson and Stevens* below.) Rather, it appears that the reservation is related to "self-help" issues decided shortly thereafter by the Board in *Muskegon*, 152 NLRB 360, since the clauses in *Centlivre* did contain "self-help" provisions. See *Centlivre, supra*, at p. 861.

sought from Centlivre, a general contractor, the "secondary" clauses set forth on p. 861 of the Board decision. These agreements would have required of Centlivre that only signatories to a contract with Respondent Unions would be permitted to work on the construction site.[15] As set out in the Trial Examiner's decision:[16]

> "As general contractor, Centlivre itself employed 6 to 9 laborers, carpenters, and cement finishers. It subcontracted particular craft operations to various firms in the Ft. Wayne area."

Centlivre had no collective-bargaining contract or relationship with the Respondent Unions. And since Centlivre employed only laborers, carpenters and cement finishers, the subcontracting agreement restrictions would have applied to work of a kind Centlivre's own employees did not perform. Thus it is entirely clear that the elements contended for by the Charging Parties in the instant cases as determinative for the validity of an on-site agreement under the construction industry proviso were absent in *Centlivre* and the Board, nevertheless, treated the clauses as within the construction industry proviso.

Significant too is the fact that in *Colson and Stevens* itself (where the facts were very like those in the instant case) the factors the Charging Parties here contend to be preconditions to proviso validity did not exist. That is, Colson had no collective-bargaining agreement or relationship with the Unions there involved and the subcontracting agreement sought covered work which employees of Colson did not perform. Thus the Unions there (Carpenters and Laborers) sought to compel Colson to grant recognition covering carpenters whom he did employ. But the Unions also sought an agreement with secondary subcontracting restrictions concerning any work Colson subcontracted and not confined to carpentry work.[17] The Board, based on its pre-*Centlivre* view that only *voluntary* agreements

15. *Supra*, p. 856 and fn. 13.
16. *Supra*, p. 859.
17. See *Colson, supra*, at p. 1650 and 1651, and fn. 1.

were within the construction industry proviso to Section 8(e), found a violation on that basis. There is no scintilla of suggestion in the Board's decision that, had the subcontracting agreement sought by the Unions been "voluntarily" entered into, the Board might nevertheless have viewed the agreement as outside the construction industry proviso. So the underlying relevant facts of *Colson and Stevens,* just as in *Centlivre,* are at odds with the contentions of the Charging Parties here.

The Board's holding in *Church's Fried Chicken,* 183 NLRB No. 102, on the facts there, is also directly contrary to the contentions of the Charging Parties. While finding a violation of Section 8(b)(7)(C) of the Act, the Board, upon exceptions filed, affirmed the dismissal of the 8(b)(4)(A) and (B) allegations of the complaint. This was based on the Trial Examiner's full discussion of the Section 8(b)(4) issues. Thus the Trial Examiner pointed out that a violation of Section 8(b)(4)(A) would require a finding that the Union was attempting to have Church sign an agreement violative of Section 8(e). And this entailed a determination whether Church was "an employer in the construction industry." Upon concluding, after discussion of the legislative history, that Church was such an employer, the Trial Examiner found that the agreement which the Union sought would not have been violative of Section 8(e) because of the construction industry proviso, and in consequence, no violation of 8(b)(4)(A) could be found. As pointed out by the Trial Examiner "Church, instead of employing a general contractor, acted as its own prime contractor through . . . its construction superintendent." It is clear that Church had no collective-bargaining agreement or collective-bargaining relationship with the Respondent Building Trades Council, nor did Church directly employ employees of the crafts which might be represented by affiliates of the Respondent Building Trades Council.[18] The holding in *Church's Fried Chicken* then also negates the Charging Party's contention.

18. With the possible exception of a laborer. See p. 3 of Trial Examiner's Decision.

The Board's post-*Centlivre* decisions giving broad scope to the proviso also militate against the Charging Parties arguments. Thus in *Muskegon*, 152 NLRB 360, the Board considered the validity under Section 8(e) of the following clause:

> "It is agreed that the members of Bricklayers Local Union No. 5 may refuse to work on any job where *any of the work, irrespective of craft,* is performed, has been performed, or is to be performed by craftsmen who enjoy less favorable *wages and working conditions* than is provided in the *current collective-bargaining agreement between the equivalent* Muskegon County Building Trades *Local Union and its contracting employers.* Such refusal shall not be grounds for discharge or other disciplinary action, but shall be regarded as a failure of the employer to provide suitable work." (Emphasis supplied.)

As emphasized in the Board decision itself, the clause permitted a strike by members of the Bricklayers Union where *any of the work irrespective of craft,* is, has, or is to be performed by craftsmen who enjoy less favorable wages and working conditions than is provided in the current collective-bargaining agreement *between the equivalent Building Trades Union and its contracting employers.* The Board, in a detailed discussion, held the clause to be within the ambit of Section 8(e) and beyond the construction industry exemption solely because of the self-help feature which the clause contained.[19]

Thus the agreement between the Bricklayers and Muskegon, apart from its "self-help" features, was viewed as valid under the proviso, though it was applicable "irrespective of craft" and was conditioned on the "wages and working conditions . . . in the collective bargaining agreement between the equivalent . . . Local Union and its contracting employers."

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19. This is made clear in the decision itself and, particularly footnote 13, where the Board rejected the General Counsel's contention based on *Colson and Stevens,* 137 NLRB 1650. The Board, citing *Centlivre,* noted that it had:

> "recently reversed *Colson and Stevens* and now holds that picketing to obtain a contract clause which is within the construction industry proviso to Section 8(e) does not violate Section 8(b)(4)(A).

Then in *Carvel*, 152 NLRB 1672, the Board considered the validity of the following clause:

> "The Employer [Carvel] agrees that no journeyman or apprentice who is a member of Local 217 . . . will be assigned to work or expected to work or required to work, on any job or project *on which a worker or person, is performing any work within the jurisdiction of Local No. 217*, if said worker or person is performing such work for wages, hours or under any *conditions* of employment, which are different from those established by this agreement." (Emphasis supplied.)

While again finding, as in *Muskegon*, that the clause was unprivileged because of its "self enforcement provisions", the Board clearly viewed the clause as otherwise within the construction industry exemption. The Board specifically rejected the contention there made that the proviso was inapplicable because the contract provision did not refer to the "contracting out" or "subcontracting" of unit work and affected persons and employers with whom Carvel had no contractual relationship.[20] The Board stated:

> ". . . the application of the proviso does not, in our view, depend on the precise relationship between Carvel with whom the Union has a contract and other employers and persons on the job, in this instance the general contractor and Ballard, who may be affected by the enforcement of the contractual proviso. The language of the proviso itself does not limit its applicability to the 'contracting out' or 'subcontracting' of work by the employer with whom a union has an agreement within the scope of Section 8(e). Indeed, were the proviso given such a limited applicability, it would be of little effect, for aside from the general contractor on a job, the various firms involved normally have control only of 'unit' work—that is, the particular work for which they hold a subcontract. Restrictions on the right to subcontract such work could well be primary, and thus lawful without reference to the construction industry proviso, because they are wholly outside the scope of 8(e)." (At p. 1676.)

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20. At p. 1677 and fn. 8.

The Board decision in *Ets-Hokin,* 154 NLRB 839, followed as recently as *Baltimore Contractors,* 190 NLRB 415, also reflect the breadth given to the construction industry proviso except where "self-help" provisions are included in the agreement. In *Ets-Hokin,* the clause at issue provided:

> "The Local Unions are part of the International Brotherhood of Electrical Workers and any violation or annulment of working rules or agreements of *any other Local Union of the IBEW,* or the subletting, assigning, or transfer of any work in connection with electrical work to any person, firm or corporation not recognizing the IBEW as the collective-bargaining representative *on any electrical work in the jurisdiction of this or any other such Local Union by the Employer,* will be sufficient cause for the cancellation of this agreement, after the facts have been determined by the International Office of the Union.

The Board in *Ets-Hokin* and in subsequent cases collected in *Baltimore Contractors, supra,* treated such a clause as within the construction industry proviso.

Thus, the Board decisions since *Centlivre* have either held or viewed the construction industry proviso as privileging what may be characterized as *Denver Building* on-site agreements despite the absence of the factors which the Charging Parties here contend are required conditions of proviso exemption, where the facts were not at odds with those of the Charging Parties' cases. And the full scope given to the proviso in such decisions points directly away from the Charging Parties' contentions.

And if, as the Board has held in cases discussed above, the exemption applies where the "agreeing" employer has no employees of the kind or craft involved,[20a] there is no reason to

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20a. As a matter of fact the Board has held, with court approval, that a "person" can violate 8(e) by entering into a proscribed agreement with a labor organization *International Association of Machinists & Aerospace Workers, AFL-CIO (Lufthansa German Airlines),* 197 NLRB No. 18, enfd. 85 LRRM 2257 (C.A. 9 January 9, 1974). Thus, if a person who employs no one can violate 8(e) it would be

attach significance to whether the agreement is in a "collective-bargaining contract" or whether there is a "collective-bargaining relationship" between the union and employer (for instance, the general contractor) party to the agreement. Since any such "collective bargaining contract" would not fix general terms and conditions of employment for any of the employer's own employees, no independent significance appears with respect to this contention of the Charging Parties.

The Court decision in *Connell, supra,* involving issues under the anti-trust laws, has also been carefully and fully considered in light of the foregoing discussion based on cases arising under the Act itself. With the fullest respect to the Court, we see no basis for relying on the dictum of the majority view and the discussion in the minority opinion of *Connell* which would warrant rejection of the foregoing discussion and analysis. Thus the Court in *Connell* was apparently of the view that the absence of a "collective bargaining relationship" would preclude a finding that the construction industry exemption to Section 8(e) might operate. And the Court apparently believed that this question has not been considered by the Board and Courts.

But these arguments[21] (the absence of a representable class of employees and its variant—the absence of a collective-bargaining relationship) are essentially indistinguishable from those rejected by the Board and Courts in the past. Thus, in addition to the above discussion, it should be noted that the absence of an employment relationship theory was directly

axiomatic that such a person could enter into a privileged 8(e) proviso agreement absent a showing that Congress intended the proviso to be narrower in coverage than the prohibition to which it is an exception.

21. The Charging Parties here argue that the fundamental representation concepts and policies reflected in Section 9(a) and 8(b)(7), when read in conjunction with the exception expressly created in 8(f), are undermined by permitting picketing for subcontracting agreements of employers who do not employ workers in the craft represented by such unions. See footnote 6 above and the discussion below concerning the "equities" position in the dissenting opinion of *Connell.*

before the Court in *San Bernadino*.[22] There, in supporting its argument that the agreement sought had an unlawful secondary effect, the Board offered the following analysis:

> "In the context presented in this case, where the subcontractor clause is sought to be imposed upon a general contractor for whom subcontracting is the normal mode of carrying on his enterprise . . . the terms of Article I-F and its uniform interpretation by the Union show [that] the clause amounts to a commitment by the signatory employer to use only AFL-CIO subcontractors, and, accordingly, to boycott another employer for reasons not strictly germane to the economic integrity of the principal work unit.
>
> "Indeed, Article I-F limits the category of permitted subcontractors *even in those crafts which, by hypothesis, the signatory employer does not himself employ*. The record contains no evidence as to the number of [the prime contractor's] employees, if any, nor as to their craft or trade. But it is improbable that . . . a small contractor, actually hires members of the entire range of trades represented in home construction; even the largest general contractors tend to employ only presons in the basic trades, subcontracting the specialty work. Article I-F, however, makes no distinction according to whether or not a subcontractor could be 'competing' with the signatory employer's own employees. Thereby it reveals its purpose to cause a boycott of 'nonunion' (i.e., non-AFL-CIO subcontractors." (Board brief in *San Bernadino*, pp. 41, 42, citations omitted. Emphasis supplied.)

The D. C. Circuit Court was not persuaded, rejecting, *sub silento*, the absence of a "collective-bargaining relationship" between the picketing Council and picketed employer as a basis for finding subcontracting agreements unprotected by the building and construction proviso to 8(e).

And in *Colson and Stevens*,[23] in the Ninth Circuit Court of

22. *Building and Construction Trades Council of San Bernadino and Riverside Counties, et al.* v. *N.L.R.B.*, 328 F.2d 540 (D.C. C.A., 1964).

23. *Construction Production & Maintenance Laborers Union, Local 383, AFL-CIO and United Brotherhood of Carpenters and*

Appeals, the Board relied upon the context of requirements under Section 8(b)(3) and 8(d) of the Act. Thus, in describing the "secondary subcontractor clause" in issue, the Board briefly characterized it as a "regulation of third party relationship extrinsic to the employment relationship" and therefore as involving a non-mandatory bargaining subject which the unions could not strike to obtain (Board's brief at p. 26).

With respect to the dissenting opinion in *Connell*, Judge Clark presented two approaches to the Section 8(e) on-site proviso, one based on equitable considerations and the other based on his view of the legislative history.

The legislative history of the construction industry proviso and its interpretation in cases arising under the Act is dealt with at length earlier. It is not repeated here. As for the dissenting Judge's views concerning "one shot" agreements and the pattern of bargaining in the construction industry prior to enactment of the 1959 amendments to the Act, the Board's brief in *Colson and Stevens, supra,* is enlightening. There, in discussing the construction industry practice legitimized by the proviso, the brief states:

> "As was pointed out in a 1950 study of building trades bargaining in the 12 counties of southern California, where a master agreement establishing basic employment standards has been in effect since 1941 in which 19 building trades unions participate together with the 10 building trades councils and the major contractors' associations, 'for the well-established employers, it is also important to have a floor under competitive labor costs.' The structure of the industry, with subcontracting a customary way of doing business, leads employers to favor subcontracting clauses as a means of undergirding such a 'floor.' The Southern California master labor agreement referred to above contains such a clause, similar to the clause that the petitioner Unions sought to force upon Colson, as a result of which 'any subcontractor [of a signatory con-

Joiners of America, Local 1089, AFL-CIO v. *N.L.R.B., (Colson and Stevens Construction Co.)*, 323 F.2d 422 (C.A. 9, 1963).

> tractor] who attempts to depart from the established union standards' faces cancellation of his contracts and an immediate loss of business.' On the other hand, if the contractor is unwilling in [these] circumstances to cancel the contract, or if he lets a subcontract to one who refuses to become bound by the master labor agreement, then the signatory contractor faces suit by the unions for specific performances with an interruption of work on his project occasioned by a change of subcontractors, and perhaps a damage suit by the ousted subcontractor. The bargaining pattern, with these effects, Congress believed legitimate and left lawful. . . ." (Board's *Colson and Stevens* brief, pp. 19-21.)

This is particularly significant when it is realized that organizing in the building and construction industry both prior to and subsequent to the 1959 amendments, was and is primarily carried on by building and construction trades councils on behalf of their constituent craft locals. The building trades agreements proffered are not conventional collective-bargaining agreements, nor is a conventional collective-bargaining relationship sought, but rather an attempt is made to obtain skeleton agreements[24] (containing little more than subcontracting provisions) which in turn are augmented by the execution of collective-bargaining agreements by the individual trade unions, the latter agreements containing provisions governing wages and other substantive conditions of employment. As the Court observed in *Dallas Building and Construction Trades Council* v. *N.L.R.B.*, 396 F. 2d 677 (C.A. D.C.), at p. 682:

> ". . . Congress intended by means of Section 8(e) to preserve the status quo of bargaining in the construction industry; and in 1959 'umbrella' agreements like the one proposed here were, as they are today, commonplace, for collective-bargaining is traditionally conducted at several levels in the construction industry. . . ."

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24. The text of a typical building and construction trades council agreement is set forth in detail in *Dallas Building and Construction Trades Council*, 164 NLRB 939, fn. 2 at p. 940.

Under this arrangement the building and trades council is as much as a "stranger" to the general contractor and his employees, if any, as the Plumbers Union was to Connell. The subcontracting clause encased in such a trades council "shell" agreement can no more be said to be obtained in the context of a collective-bargaining relationship than the proviso agreement sought or obtained in such cases as *Colson and Stevens, supra, Centlivre, supra,* and *Church's Fried Chicken, supra.*

As for the "equities" raised in the dissenting opinion, they have been substantially dealt with by the Board and Courts in cases under Section 8(b)(7) of the Act. Thus, the Board and Court in *Dallas General, supra,* have pointed out the absence of any inconsistency between the Board's interpretation of Section 8(b)(4) and the purposes of Section 8(e). The Court in *Dallas General* pointed out that "Sections 8(b)(7) and 8(e) are aimed at wholly different problems." Thus, the cases make clear that while considerations involving Section 9(a) selection of a bargaining representative may be directly related to Section 8(b)(7) of the Act,[25] such considerations are unrelated to "secondary" agreement issues under Section 8(e).

In view of all the foregoing, including Supreme Court and Circuit Court decisions, relevant legislative history and the Board's post-*Centlivre* decision, we find the contentions of the Charging Parties to provide no basis to establish under current Board law, violations of either Section 8(e) or 8(b)(4)(A) of the Act.

/s/ PETER G. NASH
Peter G. Nash
General Counsel

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25. See, e.g., in addition to *Dallas General, supra, Lane-Coos-Curry-Douglas Counties Building and Construction Trades Council, AFL-CIO,* 168 NLRB 538, enf. 415 F.2d 656 (C.A. 9); *Los Angeles Building and Construction Trades Council, et al. (Lively Construction Co.),* 170 NLRB 1499; *Church's Fried Chicken, supra;* and *Construction Trades Council of Philadelphia and Vicinity (Samuel E. Long, Inc.),* 201 NLRB No. 42, enfd. 485 F.2d 680 (C.A. 3, 1973).